Falcon Chambers

Information orders and the limits of Explanatory Notes

This post considers the decision of the High Court in *BDW Trading Ltd v Ardmore Construction Ltd & Ors* [2025] EWHC 434 (TCC).

Key points:

- The applicant ("BDW") made two applications for an information order ("IO") under s.132 of the Building Safety Act 2022, one against the first respondent ("ACL") and one against the second, third and fourth respondents ("R2 – R4").
- Both applications were dismissed. IOs may only be made against a body which is "subject to a relevant liability". Potential liability is not sufficient; nor is a liability which has been discharged by payment in full.
- The application against R2-R4, which were subsidiary/parent companies of ACL, was dismissed on the grounds that an IO can only be made against the "original body" which has a relevant liability; they cannot be made against an associated company.
- The decision suggests that an application for an IO will fail without sufficient evidence to persuade the court that the respondent appears to be liable, but that the court ought not to be embroiled in an assessment of the merits as regards liability. This indicates that the use of IOs may be limited in circumstances where there is a dispute as to liability.

Introduction

BDW was the developer of five relevant building projects, which completed between 1999 and 2005. On each of these projects BDW engaged ACL as the design and build contractor. Following the Grenfell Tower fire in 2017, a number of fire safety and/or structural defects were discovered in those developments. BDW accepted responsibility to the building and apartment owners and agreed to meet the cost of necessary remedial works, but sought a contribution from ACL on the basis that the defects were caused by ACL's breach of its duties under the Defective Premises Act 1972 ("the DPA 1972"). One of the developments, known as "Crown Heights", has already been the subject of an important decision in *BDW Trading v Ardmore Construction* [2024] EWHC 3235 (TCC), which confirmed that an adjudicator has jurisdiction to decide DPA 1972 claims.

Based on ACL's publicly available accounts, BDW concluded that ACL did not have the financial resources to satisfy its alleged liabilities and prepared to apply for a building liability order ("BLO") under s.130 of the Building Safety Act 2022 ("the BSA"). In order to do so, BDW made two applications for an order for information and documents ("an information order") under s.132 of the BSA.

The first application was against ACL. The second application was against the second, third and fourth respondents ("R2, R3 and R4"). ACL is a wholly owned subsidiary of R2. R2 is a wholly owned subsidiary of R3. R3 is a wholly owned subsidiary of R4, which is the ultimate parent company.

Sections 130 to 132 of the BSA

The starting point is s.130 of the BSA. The provisions most relevant to the present decision are as follows:

(1) The High Court may make a building liability order if it considers it just and equitable to do so.

(2) A "building liability order" is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate ("the original body") relating to a specified building is also -

(a) a liability of a specified body corporate, or

(b) a joint and several liability of two or more specified bodies corporate.

(3) In this section "relevant liability" means a liability (whether arising before or after commencement) that is incurred –

(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or

(b) as a result of a building safety risk.

(4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.

S.131(1) then provides that a body corporate is associated with another body corporate if one of them controls the other, or a third body corporate controls both of them. Subsections (2)-(4) define the meaning of "control" over a company.

Under s.132(2), an IO is defined as *"an order requiring a specified body corporate to give, by a specified time, specified information or documents relating to persons who are, or have at*

any time in a specified period been, associated with the body corporate". By subsection (3), an IO may be made only if it appears to the court:

> *(a) that the body corporate is subject to a relevant liability (within the meaning of section 130), and*
> *(b) that it is appropriate to require the information or documents to be provided for the purpose of enabling the applicant (or the applicant and others) to make, or consider whether to make, an application for a building liability order.*

Two examples of the operation of these provisions are given in the Explanatory Notes to the BSA. In the example given for BLOs at paragraph 1074, a freeholder discovers that the development company was dissolved after the building was completed and the freehold sold off. The freeholder successfully applies for a BLO against the development company's parent company, which is associated with the development company. The scenario is the same for IOs at paragraph 1096, save that the leaseholder successfully applies for an IO against the parent company.

The decision

HHJ Keyser KC dismissed both applications. He gave detailed guidance on the meaning of s.132(3)(a), which provides that a court may only make an IO against a company *"if it appears to the court that the body corporate is subject to a relevant liability"*. While both a BLO and an IO can be made without a prior determination of liability, an IO requires the court to form a view on the question for the purpose of the application.

The Judge rejected the submission that "potential" liability is sufficient to engage s.132(3)(a). The Judge thought that such an interpretation would accord with the example in the Explanatory Notes, and would address what the Judge described as *"a very real practical problem where such liability has not previously been established"* [25]. However, he was not persuaded that the words "is subject to a relevant liability" could be constructed as "might have a relevant liability". Nor is it sufficient that the applicant has received expert advice that the building is subject to fire safety/structural defects and requires remedial works, or legal advice that it has a claim against the original body; the wording of subsection (3) requires it "to appear" to the court that there is a relevant liability.

However, the court need not *"become embroiled in assessments of the merits of disputed matters"* or determine whether there is a relevant liability following a trial of the merits. A judge dealing with such an application, it was said, *"is not making any determination of liability but merely saying how things appear to him; detailed reasons for why one view is preferred to another do not seem to me to be appropriately required."*

This gives rise to a practical question. What is to be expected on the hearing of an application for an IO where liability has not been determined? The Judge held that where there is an active dispute as to liability, the applicant should not be putting its evidence before the court and inviting an assessment on the merits. Applications under s.132 should be short and uncomplicated, which might mean that such applications are made sparingly in cases where liability is in issue.

In the present case, BDW argued that the court could be satisfied that ACL had a relevant liability in respect of Crown Heights, which had already been subject to adjudication in which BDW was awarded its entire claim. This argument was rejected on the basis that the liability in the adjudication award had been discharged by payment in full; ACL could no longer be said to be subject to that liability.

As to the other four developments, BDW's argument was that it was likely that ACL had a relevant liability in respect of at least one development in light of several pieces of evidence. This argument was rejected for two reasons. First, the court can only grant an application for an IO if it is satisfied that there is a liability in relation to the specified building which is the potential subject of a BLO. Second, the most that the Judge was prepared to say was that ACL may well have a relevant liability to BDW; it did not appear that it actually had such a liability.

The application against R2-R4

HHJ Keyser KC held that there was no basis for supposing that R2-R4 had any relevant liability within the meaning of s.130. ACL alone was party to the underlying building contracts and ACL alone could have a relevant liability. At most, R2-R4 were associates of a company with a relevant liability.

The Judge noted that this conclusion is contrary to the example of IOs given in the Explanatory Notes to the BSA 2022. The example shows an IO being made not against the original body (i.e. ACL) but against the company believed to be an associate (R2-R4). That, the Judge ruled,

is *"impossible to square with the wording of section 132. The corporate body required to give the information (section 132(2)) is the corporate body subject to the relevant liability (section 132(3)(a)), not an associate of that corporate body"* [18].

HHJ Keyser KC reminded himself of Lord Steyn's comments about the use that courts may make of Explanatory Notes as an aid to construction in *R (Westminster City Council) v NASS* [2002] UKHL 38. Although a court may take into account an Explanatory Note in order to understand the contextual scene in which an Act is set, the Notes are not endorsed by Parliament and do not reflect its will. It is impermissible to allow the Explanatory Notes to override the meaning of the statute. Counsel for BDW accepted in submissions that the example in the Explanatory Notes was inconsistent with s.132; therefore, the court did not have jurisdiction to make an IO against R2-R4.

Comment

This decision is a salient reminder of the limitations of Explanatory Notes as an aid to statutory construction. The example in the Explanatory Notes describes an IO being made against an associated body corporate where the applicant had been given advice that a claim could be made against the original body and intended to seek damages from the original body. This decision confirms that the example is inconsistent with s.132(2) in respect of the body corporate against whom an IO can be made, and that the potential liability described in the example is not sufficient to satisfy s.132(3)(a).

S.130 of the BSA is drafted so as to allow the court to pierce the corporate veil. This decision demonstrates the limits of those provisions; relevant liability does not attach to an associated body corporate until after a BLO is made, and thus such companies are not caught by s.132. If IOs cannot be made against companies associated with the original body, which may be a dissolved SPV, then the use of IOs may be severely curtailed.

The use of IOs might also be limited in circumstances where there is a dispute as to liability. It may now be difficult for applicants to assess what evidence should be adduced in support of such an application in such circumstances. The Judge's conclusion, which suggests that an application will fail absent sufficient evidence to persuade the court as to the appearance of liability, is at least to some extent in tension with his remarks that an IO can be made before liability is established but that an applicant ought not to be putting evidence before the court and inviting an assessment on the merits.

TOBY BONCEY

GWYNETH EVERSON